Norizan bin Bakar v Panzana Enterprise Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-29–11 OF 2012(W)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, ABDULL HAMID EMBONG AND ZAINUN ALI FCJJ
8 OCTOBER 2013

Labour Law — Industrial Court — Powers — Whether Industrial Court could substitute own view in place of employer's view on appropriate penalty for employee's misconduct — Whether doctrine of proportionality of punishment inbuilt into Industrial Relations Act 1967 empowered Industrial Court to decide if punishment of dismissal unduly harsh — Whether Industrial Court's decision always open to judicial review on grounds of illegality, irrationality, procedural impropriety and proportionality

The appellant was dismissed from employment as personal assistant to the respondent's chairman after the company's domestic inquiry panel found him guilty of four charges of misconduct. The appellant filed a claim for reinstatement with the Industrial Relations Department and the matter of his dismissal came before the Industrial Court for adjudication on Ministerial reference under s 20(3) of the Industrial Relations Act 1967 ('IRA'). The Industrial Court found the appellant not guilty of three of the charges but only of the one charge of breaching the respondent's Code of Conduct by failing to disclose the fact he was a managing director of another company ('NKM') whilst being in the respondent's employment. The Industrial Court, however, viewed that misconduct as not serious enough to warrant a dismissal but because reinstating the appellant was felt to be not an appropriate remedy the court awarded him compensation in lieu of reinstatement plus back-wages and reduced the total award payable to him by 30% on account of his contributory misconduct. The respondent applied to the High Court to quash the award but was unsuccessful. The High Court held the Industrial Court had not committed any error of law or jurisdictional error and that the punishment of dismissal of the appellant was unduly harsh and without just cause or excuse. The court took into account, inter alia, the fact that the appellant's directorship in NKM did not affect the respondent in any way; that NKM was a dormant company at all material times; and that the respondent's Code of Conduct was merely a guideline. The respondent appealed to the Court of Appeal against that decision. The appeal was allowed, the High Court's decision was set aside and an order of certiorari was allowed to issue to quash the Industrial Court's award. The Court of Appeal held that both the Industrial Court and the High Court were wrong to have substituted their own views — in place of the respondent's view — as to what was the appropriate penalty to be meted out to

the appellant for his misconduct. In his instant appeal to the Federal Court against the Court of Appeal's decision, the appellant submitted that the doctrine of proportionality of punishment gave the Industrial Court jurisdiction to consider and evaluate whether an employer's decision to dismiss his employee was unduly harsh and that the 'reasonable employer' test, ie what penalty a reasonable employer would have imposed in the circumstances, could not override the provisions and spirit of the IRA.

Held, dismissing the appeal:

(1) The dismissal of the appellant by the respondent was fair and not unfair. The Industrial Court failed to direct its mind to all matters it should have taken into account. If it had done so it would have reached the conclusion that the dismissal of the appellant was reasonable (see para 43).

(2) The Industrial Court had directed its mind only to factors that favoured the appellant, disregarding the very important consideration that he was holding the position of special assistant to the respondent's chairman and that the appellant's misconduct destroyed the trust and confidence the respondent had placed in him. After having signed and accepted the respondent's Code of Conduct, the appellant dishonestly declared in writing that he was not serving on the board of directors of any company when, in fact, he was at all material times serving on the board of NKM. He knowingly made a false declaration and on the facts and circumstances of the case it was not a minor misconduct (see para 42).

(3) In deciding whether a proven misconduct constituted just cause or excuse for dismissal the Industrial Court had power to decide, using the doctrine of proportionality of punishment which was inbuilt into the IRA and acting in accordance with equity, good conscience and the substantial merits of the case as mandated by s 30(5) of the IRA, whether the punishment of dismissal was appropriate or too harsh in the circumstances (see paras 35–36 & 39).

(4) The Industrial Court could therefore substitute its own view, in place of the employer's, as to what was the appropriate penalty for an employee's misconduct and go on to decide the relief to be granted by taking into account the claimant's contributory misconduct (see para 39).

(5) As to what was the test to be used in deciding whether a proven misconduct constituted just cause or excuse for dismissal was a non-issue. Whether it was the 'reasonable employer' test or the 'reasonable man' test, the Industrial Court's decision on that issue was always open to judicial review on grounds of illegality, irrationality, procedural impropriety and possibly proportionality and the courts were clothed with powers to scrutinise the decision not only for process but also for substance (see paras 40–41).

[Bahasa Malaysia summary

Perayu telah dipecat daripada pekerjaan sebagai pembantu peribadi kepada pengerusi responden selepas panel siasatan dalaman syarikat tersebut mendapatinya bersalah terhadap empat pertuduhan salah laku. Perayu telah memfailkan tuntutan untuk pengembalian jawatan dengan Jabatan Perhubungan Perusahaan dan perkara berhubung pemecatannya telah dihadapkan ke Mahkamah Perusahaan untuk pengadilan atas rujukan Menteri di bawah s 20(3) of the Akta Perhubungan Perusahaan 1967 ('APP'). Mahkamah Perusahaan mendapati perayu tidak bersalah untuk tiga pertuduhan tersebut tetapi hanya satu pertuduhan kerana melanggar Kod Etika responden apabila gagal mengemukakan fakta yang dia merupakan pengarah urusan syarikat lain ('NKM') semasa bekerja untuk responden. Mahkamah Perusahaan, bagaimanapun, melihat salah laku tersebut sebagai suatu yang tidak cukup serius untuk mewajarkan pemecatan namun oleh kerana mengembalikan jawatan perayu dirasakan bukan remedi yang sesuai maka mahkamah mengawardkannya pampasan sebagai ganti pengembalian jawatan beserta tunggakan gaji dan mengurangkan keseluruhan award yang perlu dibayar kepadanya sebanyak 30% berdasarkan sumbangan salah lakunya. Responden memohon Mahkamah Tinggi membatalkan award tersebut tetapi tidak berjaya. Mahkamah Tinggi memutuskan bahawa Mahkamah Perusahaan tidak melakukan apa-apa kesilapan undang-undang atau kesilapan bidang kuasa dan bahawa hukuman pemecatan ke atas perayu tidak wajar dan tanpa sebab atau alasan yang adil. Mahkamah mengambil kira, antara lain, fakta bahawa jawatan pengarah perayu dalam NKM tidak menjejaskan responden dalam apa cara pun; bahawa NKM merupakan syarikat tidak aktif pada setiap masa matan; dan bahawa Kod Etika responden hanyalah sebagai garis panduan. Responden telah merayu kepada Mahkamah Rayuan terhadap keputusan tersebut. Rayuan itu telah dibenarkan, keputusan Mahkamah Tinggi telah diketepikan dan perintah certiorari telah dibenarkan untuk membatalkan award Mahkamah Perusahaan. Mahkamah Rayuan telah memutuskan bahawa kedua-dua Mahkamah Perusahaan dan Mahkamah Tinggi silap kerana mengubah pandangan mereka — dengan pandangan responden — berhubung penalti yang sesuai untuk dikenakan ke atas perayu kerana salah lakunya. Dalam rayuannya ini kepada Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan, perayu telah berhujah bahawa doktrin perkadaran hukuman memberikan bidang kuasa kepada Mahkamah Perusahaan untuk mempertimbangkan dan menilai sama ada keputusan majikan untuk memecat pekerjanya adalah tidak wajar dan bahawa ujian 'reasonable employer', iaitu apakah penalti yang akan dikenakan oleh seorang majikan yang munasabah dalam keadaan tersebut, yang tidak akan mengatasi peruntukan-peruntukan dan niat APP tersebut.

Diputuskan, menolak rayuan:

(1) Pemecatan perayu oleh responden adalah adil dan bukan tidak adil.

Mahkamah Perusahaan gagal mengarahkan mindanya kepada semua perkara yang patut diambil kira. Jika ia telah berbuat sedemikian maka ia mungkin akan mencapai kesimpulan bahawa pemecatan perayu adalah munasabah (lihat perenggan 43).

(2) Mahkamah Perusahaan telah mengarahkan mindanya hanya kepada faktor yang berpihak kepada perayu, tanpa menghiraukan untuk mempertimbang yang paling penting bahawa dia memegang jawatan sebagai pembantu peribadi kepada pengerusi responden dan bahawa salah laku perayu telah menghancurkan kepercayaan dan keyakinan responden yang diletakkan padanya. Selepas menandatangani dan menerima Kod Etika responden, perayu secara tidak jujur telah mengisytiharkan secara bertulis bahawa dia tidak berkhidmat dalam lembaga pengarah mana-mana syarikat walhal, sebenarnya, dia pada setiap masa matan sedang berkhidmat dalam lembaga NKM. Dia dengan pengetahuan telah membuat deklarasi palsu dan berdasarkan fakta dan keadaan kes tersebut ia bukan suatu salah laku yang kecil (lihat perenggan 42).

(3) Dalam memutuskan sama ada salah laku yang telah dibuktikan membentuk sebab dan alasan yang adil untuk pemecatan Mahkamah Perusahaan mempunyai kuasa untuk memutuskan, menggunakan doktrin perkadaran hukuman yang dinyatakan dalam APP dan bertindak menurut ekuiti, kesedaran yang baik dan merit-merit substantial kes tersebut sebagaimana dimandatkan oleh s 30(5) APP, sama ada hukuman pemecatan adalah sesuai atau terlalu keras dalam keadaan berikut (lihat perenggan 35–36 & 39).

(4) Mahkamah Perusahaan dengan itu boleh menggantikan pendapatnya sendiri, dengan majikannya, berhubung penalti yang sesuai untuk salah laku pekerja dan seterusnya memutuskan relief yang patut diberikan dengan mengambil kira sumbangan salah laku penuntut (lihat perenggan 39).

(5) Berhubung ujian yang patut digunakan dalam memutuskan sama ada salah laku yang dibuktikan itu membentuk alasan atau sebab yang adil bukan satu isu. Sama ada ia adalah ujian 'reasonable employer' atau ujian 'reasonable man', keputusan Mahkamah Perusahaan berhubung isu tersebut sentiasa terbuka untuk kajian semula atas alasan ia menyalahi undang-undang, tidak rasional, ketidakwajaran prosedur dan mungkin perkadaran dan mahkamah telah diberikan kuasa untuk meneliti keputusan itu bukan sahaja untuk proses tetapi juga untuk bukti kukuh (lihat perenggan 40–41).]

Notes

For cases on powers, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1801–1803.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750; [1997] 2 CLJ 79, CA (refd)
British Leyland UK Ltd v Swift [1981] IRLR 91, CA (refd)
Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)
NC Watling & Co Ltd v Richardson [1978] ICR 1049 (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)
Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ranjit Kaur S a/p Gobal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Swedish Motors Assemblies Sdn Bhd v Hj Mohd Ison bin Baba [1998] 2 MLJ 372; [1998] 3 CLJ 288, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, FC (refd)

Legislation referred to

Criminal Procedure Code s 173A(ii)(b)
Employment Act 1955 s 14(1)
Employment Protection (Consolidation) Act 1978 [UK] s 57(3)
Federal Constitution arts 132, 135
Industrial Relations Act 1967 ss 20, 20(1), (3), 30(5), (6), Second Schedule Item 5
Penal Code s 409
Public Officers (Conduct and Discipline) (Chapter D) General Order 1980 general orders 4(2)(d), 33, 35(1), 36

Appeal from: Appeal Civil No W-01–106 of 2009 (Court of Appeal, Putrajaya)

VK Raj (Ravindra Murugavell, Mohan Ramakrishnan, Arun Kumar, Ramdhari JBS, Chandra Segaran, RP Vickneswaren, Muhendaran Suppiah and Sunil Vijayan with him) (Murugavell Arumugam & Co) for the appellant.
A Ramadass (M Jothiletchimy with him) (Ramadass & Associates) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of

Appeal given on 10 February 2012 in allowing the respondent's appeal against the decision of the High Court. The High Court had earlier on 31 March 2009 dismissed the respondent's application for judicial review to quash the Industrial Court's Award No 154 of 2006 dated 5 January 2006.

[2] On 22 October 2012, the Federal Court granted the appellant leave to appeal on the following questions of law, namely:

(a) whether the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an award under s 20(3) of the Industrial Relations Act 1967; and

(b) further and/or in the alternative, whether the Industrial Court in exercising its functions as stated in the paragraph above can rely to its powers under s 30(5) of the Industrial Relations Act 1967 specifically based on the principle of equity, good conscience and substantial merits of the case.

BACKGROUND FACTS

[3] This is a case where the appellant, an employee of the respondent, after a domestic inquiry was dismissed from his employment by the respondent when he was found guilty of four charges of misconduct. The allegation of misconduct levelled against the appellant was that he (the appellant) had falsely declared in writing in breach of the respondent company's Code of Conduct that he was not serving on the board of directors of any other company when he was at all material times found to be serving on the board of directors of another company. The salient facts leading to the appellant's dismissal are these: The appellant commenced employment with the respondent company on 19 September 1994 as an assistant manager. He was promoted to the position of manager on 1 May 1995 and later as the personal assistant to the respondent's chairman on 10 April 1999. On 29 October 1999, the respondent issued a show cause letter to the appellant wherein the appellant was asked to explain the four allegations of misconduct levelled against him. The appellant replied to the show cause letter on 1 November 1999. The respondent was not satisfied with the appellant's explanation and issued a notice to the appellant to attend a domestic inquiry on 10 November 1999 to answer the four charges of misconduct preferred against him. The relevant charges read as follows:

First charge

You, knowingly and deliberately did not comply with the company's procedure on leaving the office premises during office hours, by not recording your absence from office during office hours, in the 'leaving office premises during office hours register' maintained at the reception area. Records in the register with effect from 10th February 1999 to 25th October 1999 and your response to the numerous queries raised by the Human Resource & Administration Department with regard to your absence from office, confirms that you have not complied with the said procedure.

Second charge

On 19 October 1999, you committed an act of Gross Insubordination by relinquishing your position as Personal Assistant to the Chairman, by writing a note to the Chairman's Executive Assistant, stating that you no longer work for the Chairman. In your note, you also implied that you have abandoned three assignments that were entrusted to you by the Chairman.

Third charge

On 15 July 1999, you committed an act of dishonesty and breach of trust placed upon you as Personal Assistant to the Chairman, by taking without approval or permission from the Chairman, one (1) badminton racket from the Chairman's contribution of five (5) rackets from the Chairman's contribution of five (5) badminton rackets to Panzana's Sports Club.

Fourth charge

Despite signing Panzana's Code of Conduct for employees on 29th November 1997, you breached point No. 1 of the code, by not disclosing and obtaining written approval from the Group Chief Executive Officer, of your direct interest as Director of NK Media Sdn Bhd.

[4] The domestic inquiry panel found the appellant guilty of all four charges. He was dismissed by the respondent from his employment. Being dissatisfied with his dismissal, the appellant filed a claim for reinstatement with the Industrial Relations Department under s 20 of the Industrial Relations Act 1967 ('IRA'). When reconciliation process before the Industrial Relation Department failed, the honorable Minister of Human Resources acting under s 20(3) of the IRA referred the matter to the Industrial Court for a decision.

AT THE INDUSTRIAL COURT

[5] The Industrial Court after a full trial handed down its award on 5 January 2006. The Industrial Court found the appellant not guilty of the first three charges, but found him guilty of the fourth charge. However, the Industrial Court was of the opinion that the appellant's misconduct was only minor, which did not warrant a dismissal. The Industrial Court was of the view that reinstatement was not the right remedy and, therefore, ordered back wages and compensation in lieu of reinstatement. The Industrial Court also ordered 30%

liability on the part of the appellant for his misconduct. In consequence, the respondent was ordered to pay the sum of RM109,000 being backwages for 24 months after deducting 30% for the appellant's misconduct and compensation in lieu of reinstatement of RM39,000 (one month wages for every year served). The relevant part of the Industrial Court's decision which merits reproduction are as follows:

> The claimant was certainly guilty of charge 4 as he was the director of NK Media Sdn Bhd prior to signing of the Code of Conduct on 29 November 1997. The claimant's contention that it was a genuine oversight on his part is not true. He has committed misconduct. However this misconduct alone is not sufficient to dismiss the claimant. This court considers the claimant's misconduct as a minor misconduct which does not warrant the company to dismiss him. NK Media Sdn Bhd is a family business. It is not a competitive company to the Panzana Group of Companies which involves in construction. The claimant's company was only dealing with general trading. This piece of evidence was not rebutted by the company. Moreover at that point in time NK Media Sdn Bhd was dormant. This piece of evidence was also not rebutted.
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> For the above said reasons, this court comes to the conclusion that though the claimant had committed misconduct, it was only minor in nature and it doesn't warrant dismissal.
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> Perusing through the evidence of all the witnesses and the documents submitted before this court, this court comes to the conclusion that the dismissal of the claimant is without just cause or excuse.
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> Reinstatement is not the right remedy in this case. This court therefore orders backwages and compensation in lieu of reinstatement. This court also orders 30% liability on the part of the claimant for his misconduct.

AT THE HIGH COURT

[6] Dissatisfied with the award handed down by the Industrial Court, the respondent filed an application for judicial review in the High Court seeking an order for certiorari to quash and set aside the Industrial Court award. The High Court in dismissing the respondent's application for judicial review found that the Industrial Court did not commit any error of law and that there was no jurisdictional error on the part of the Industrial Court which would merit interference by an order of certiorari. The High Court found that the dismissal of the appellant by the respondent was unduly harsh and without just cause or excuse taking into consideration the following:

(a) the interest of the respondent was not affected in the appellant being the director of NK Media Sdn Bhd;

(b) the respondent's company and NK Media Sdn Bhd has no link with each other and NK Media Sdn Bhd was not a competitor company;

(c) the Code of Conduct imposed by the respondent company is only a guideline;

(d) NK Media was a dormant company; and

(e) the respondent was not affected in any way in the appellant being the director of NK Media.

AT THE COURT OF APPEAL

[7] Aggrieved by the High Court decision the respondent lodged an appeal to the Court of Appeal. The Court of Appeal allowed the respondent's appeal and accordingly set aside the decision of the High Court. The respondent's application for an order of certiorari to quash the Industrial Court's award was, therefore, allowed. The Court of Appeal was of the view that:

> In an application for judicial review, the Industrial Court and indeed the High Court are concerned with the application of procedural fairness in relation to the decision-making process and not the decision itself. *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 (CA). In considering the reasonableness of what a reasonable employer would have done, the Court (whether Industrial Court, High Court or Court of Appeal) must not substitute its own views (as what the appropriate penalty for the employee's conduct) for the view of the employer concerned. We hold that the Industrial Court and the High Court had erred in substituting their own views (on the appropriate penalty) for the views of the employer.

SUBMISSIONS

[8] The thrust of the appellant's submission before us was that the Court of Appeal misdirected itself in law and fact, when it held that the Industrial Court, High Court or the Court of Appeal must not substitute its own views as to what is the appropriate penalty for the employee's conduct for the view of the employer concerned. It is the appellant's bone of contention that the Industrial Court is fully endowed with the jurisdiction to consider and evaluate the harshness of the employer's decision to dismiss the employee through the doctrine of proportionality of punishment, (see s 20 of the IRA; Item 5 of the Second Schedule to the IRA and Federal Court case of *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537).

[9] Premised on the above learned counsel submitted that the Court of Appeal in deciding whether the dismissal of an employee is right in law had erred in placing its reliance on the minority decision of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 which was cited with approval and followed in the Federal Court case

of *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405. Learned counsel strenuously argued that the minority decision of *Tan Tek Seng* was based on the'reasonable employer' test based on s 57(3) of the Employment Protection (Consolidation) Act 1978 (UK) which was propounded in the English Case of *British Leyland UK Ltd v Swift* [1981] IRLR 91 which is alien to our local industrial law jurisprudence. Learned counsel submitted that rightfully s 20(1) of the IRA 1967 is more applicable in determining whether the dismissal of an employee is right in law.

[10] Learned counsel for the respondent conversely submitted that the appellant had clearly misconstrued the findings of the Court of Appeal in *Tan Tek Seng* and the principles laid down thereunder. Learned counsel submitted that the correct test based on the case of *Tan Tek Seng* was whether it would be reasonable for the appellant's employers to dismiss him on the facts and circumstances of the case. Put simply, whether what has been done by the employer is something that no reasonable management would have done. Applying this test to the present case, learned counsel submitted that it was reasonable for the respondent to dismiss the appellant since it was clearly stipulated in the Code of Conduct which was signed and accepted by the appellant that he shall not be involved in any other company except with the express approval from the respondent.

[11] Given that the appellant did breach the aforesaid Code of Conduct, learned counsel for the respondent submitted that the Court of Appeal did not commit any error in its finding that the appellant's dismissal was reasonable.

ISSUES AND FINDINGS

[12] At the outset we would like to state here that the judgment of the Court of Appeal in the present case is a mirror of the dissenting judgment of NH Chan, JCA in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 ('Tan Tek Seng') where His Lordship held:

> When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[13] In *Tan Tek Seng*, the appellant ('Tan') was a senior assistant attached to a primary school in Johor. He was charged before the sessions court with two counts of criminal breach of trust under s 409 of the Penal Code. He was convicted and sentenced to six months imprisonment. He appealed to the High Court at Muar. The High Court affirmed the finding of guilt but set aside

the conviction and sentence, and in place of that made an order that Tan be bound over to be of good behaviour for three years in the sum RM5,000 without surety under s 173A(ii)(b) of the Criminal Procedure Code.

[14] Disciplinary action was taken against Tan. It was recommended by the Johor Education Department that Tan be reduced in rank and salary pursuant to general order 36 of the Public Officers (Conduct and Discipline) (Chapter D) 1980 ('General Orders 1980'). Notwithstanding the recommendation, the disciplinary authority treated the order of the Muar High Court as a conviction against Tan, as well as took it that Tan had conducted himself 'in such manner as to bring the public service into disrepute' contrary to general order 4(2)(d) of the General Orders 1980. As a result, the Disciplinary Authority acting under general orders 33 and 35(1) dismissed Tan from the service.

[15] Dissatisfied with the decision of the disciplinary authority, Tan instituted a writ action in the High Court Johor Bahru, seeking a declaration that his dismissal was null and void. The High Court, inter alia, took the view that conviction was tantamount to Tan conducting himself in such manner as to bring the public service into disrepute contrary to general order 4(2)(d), and so confirmed the dismissal as being legitimate and effected according to law. Before the Court of Appeal, one of the primary question which arose was: whether the punishment of dismissal as imposed was proportional to the misconduct found to have been committed by Tan and if not, whether a lesser punishment ought to be opted for. Gopal Sri Ram JCA (as he then was) speaking for the majority held that the order of dismissal was too severe a punishment to be imposed on Tan. The order of dismissal was replaced with an order that the appellant be reduced in rank in a manner as proposed by the Johor Education Department.

[16] His Lordship NH Chan JCA dissented. His Lordship in his dissenting judgment stated that the correct test to be adopted by the Court of Appeal on an appeal or the High Court on the original hearing is to determine whether, it was reasonable for the Disciplinary Authority to dismiss Tan on those facts. In laying down the foundation for such a test, His Lordship adopted the words of Philips J in the case of *NC Watling & Co Ltd v Richardson* [1978] ICR 1049. His Lordship had this to say:

> It is not for this court on an appeal, nor for any other court on the original hearing, to decide whether it would have dismissed on those facts. I think the correct test for this court on an appeal or for the High Court on the original hearing is to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. I gratefully adopt the words of Phillips J in *NC Watling & Co Ltd v Richardson* [1978] ICR 1049 at pp 1056–1057:

> … the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved.
>
> It has to be recognised that there are circumstances where more than one course of action may be reasonable.

[17] His Lordship NH Chan in stating his views aforesaid stood guided by the reasonable employer's test as propounded by the English authorities and in particular the English Court of Appeal's decision in *British Leyland UK Ltd v Swift* [1981] IRLR 92. In *British Leyland*, one Mr Swift was dismissed after 18 years' service with the company after a road fund licence (tax disc) belonging to the company's Land Rover was found on Mr Swift own vehicle. When asked by the police about the matter, Mr Swift said he had found the tax disc outside the factory. He was charged with theft of the tax disc. Before the magistrate, he pleaded not guilty to theft but guilty to fraudulently using the tax disc. He was convicted and fined £30.

[18] Mr Swift's conviction came to the knowledge of the company and an investigation was carried out. Mr Swift then maintained that he had lent his vehicle to a friend on the understanding that the friend would have the vehicle taxed and tested before he used it. When the vehicle was returned to him, the tax disc was in position and he had no idea that it was false. Following an investigation, Mr Swift was dismissed.

[19] Mr Swift took the case before the English Industrial Tribunal, and his complaint was his dismissal was unfair. The Industrial Tribunal held that 'there was abundant evidence available on which any reasonable employer would have come to the conclusion that the applicant had been guilty of gross misconduct'. However, the Industrial Tribunal went on to find that the dismissal was unfair. According to the Industrial Tribunal, given Mr Swift's previous work record, dismissal was too severe a penalty for what they saw a relatively minor offence which had already been dealt with by the magistrate. And they pointed that Mr Swift was not employed in a fiduciary capacity. However, the Industrial Tribunal did find that Mr Swift was three-quarters to blame and the compensation was accordingly reduced by 75% on the grounds of contributory fault.

[20] The decision of Industrial Tribunal was upheld on appeal on a majority decision by the Employment Appeal Tribunal. However, on further appeal by

the company, the English Court of Appeal allowed the appeal and substituted the finding that the dismissal was fair. Lord Denning MR gave the following reasons:

> The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: '… a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate'. I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.
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> But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say, 'I am sorry; I made a mistake. I ought not to have done it. I will not do anything of the kind again'. He did not even tell the same story he told the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is Mr Swift did not 'come clean' when he was found out. He put forward a wholly untruthful account. That seems to me to be a most relevant consideration for the employers to take into account in deciding whether it was reasonable to dismiss him or not. But there is not a word about it in para 12 when they set out their reasons. On the contrary, the offence was mentioned as being 'a relatively minor one'. They refer to it almost as if he had paid the penalty and ought not to be penalised for it any more. That was the wrong approach. If a man is convicted and fined, it is a ground for dismissing him and not for keeping him on.
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> The Employment Appeal Tribunal were very troubled about the case. They said:
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> > We have thought, all of us, deeply, carefully and long over this case, which must come very near the borderline. Had we been the Industrial Tribunal who had to exercise the function which it exercised in this case, it seems highly likely that we would have decided the case in the opposite sense. One of our number is wholly convinced by the reasoning which is put forward on behalf of the employers, that this is a perverse decision; that an employer, in particular a motor manufacturer, faced with these circumstances, must, in view of the finding of gross misconduct or gross dishonesty, have had available to him, while acting reasonably, at any rate an available option of dismissal. The other two of us, while far from being convinced by the reasoning of the Tribunal, have not found it possible to come to the conclusion that the Tribunal acted perversely …

Now it comes to us. It is my opinion that the Industrial Tribunal failed to take into account the conduct of Mr Swift when he was tackled with this offence. That is a very relevant consideration, which would influence any reasonable employer. I am not prepared to say that no reasonable employer would have dismissed him in the circumstance. On the contrary, it seems to me that many a reasonable employer in the circumstances would have thought it right to dismiss him.

I would therefore allow the appeal and hold that the dismissal was fair and not unfair.

[21] Lord Justice Ackner in the supporting judgment gave the following reasons:

What then accounts for this surprising decision — to put it bluntly — that no reasonable employer would have dismissed a person not only guilty of gross dishonesty, but a person who persistently and unrepentantly sought to lie his way out of that offence? The explanation is to be found in one paragraph, para 12, where the tribunal say:

> The offence was a relatively minor one for which he has already been dealt with in the magistrates courts so far as the criminal aspect is concerned Mr Swift is not employed in a fiduciary capacity. There is no evidence that they have suffered in any way as a result of this lapse in the interval between the conviction and it being brought to their notice. The penalty should obviously be related to the offence and we consider that the employers have over-reacted.

It seems to me quite clear that in justifying their surprising conclusion, to which I have referred, they have confined their attention to the offence, and they have not done that wholly accurately; because the offence, which they say was dealt with by the magistrates, was an offence based upon an assertion of fact which neither the employers nor the tribunal accepted as being correct. He knew that it was the company's disc, and that was not put before the magistrates. But what is much more important is that they leave out of account his subsequent behavior. The apparent justification for leaving that out seems to be found in the phrase, 'Mr Swift is not employed in a fiduciary capacity'. But it is a truism that trust is one of the important foundations of the relationship between master and servant; and, in my judgment, to have confined their attention to the offence and not to his conduct subsequent to the offence, was a misdirection. It is clear that the Tribunal itself thought that the matter was close to the borderline because they concluded that the applicant was largely responsible for his own down fall, and that was why they reduced his compensation by 75%. If they had taken into account the subsequent conduct, I feel sure they would have reached another conclusion — a conclusion that a reasonable employer had at least the option to dismiss an employee in these circumstances, if the employer were so minded.

[22] Lord Justice Griffiths who also wrote a supporting judgment had this to say:

> Unwilling to think that an Industrial Tribunal would be perverse, I ask myself, how did they come to this rather astonishing conclusion? For myself, I agree, for the reasons given by my Lord the Master of the Rolls and Lord Justice Ackner, that the answer is to be found in the fact that, when they came to consider the fairness or otherwise of the dismissal, they appear to have concentrated exclusively on the mitigating factors affecting the employee, and entirely disregarded the very serious breakdown in trust which must have arisen from this employee persisting in a lying explanation of his conduct.
>
> Accordingly I agree that this Industrial Tribunal did not direct its mind to all the matters it should have taken into account; and I am convinced that, had they had those factors in mind, they could not have concluded that an employer who had the option of dismissal open to him acted unfairly in the circumstances of this case. Accordingly I too think that this appeal should be allowed.

[23] Clearly from the above, the English Court of Appeal did not rule that the Industrial Tribunal or Employment Appeal Tribunal cannot interfere with the decision of the company in dismissing Mr Swift. No doubt they had come out with the reasonable employer's test, but what concerned them most was that on the facts and circumstances, Their Lordships were astonished as to how the Industrial Tribunal had come to a decision that the dismissal of Mr Swift was unfair, overlooking the vital aspects surrounding the dismissal. The Industrial Tribunal in considering the fairness or otherwise of the dismissal of Mr Swift had appeared to have concentrated exclusively on the mitigating factor affecting Mr Swift's dismissal and entirely disregarding the very serious breakdown in trust which must have arisen from Mr Swift's persistence in a lying explanation of his conduct. The Court of Appeal pointed out that the Industrial Tribunal had failed to direct its mind to all matters it should have taken into account, and Their Lordships were convinced that had it done so it would have concluded that the dismissal of Mr Swift by the company was fair.

[24] It was on those facts and circumstances that the 'reasonable employer's test' was propounded in *British Leyland* and later it found its way in the dissenting judgment of NH Chan, JCA in *Tan Tek Seng*. The dissenting judgment of His Lordship NH Chan in *Tan Tek Seng* was cited with approval by the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 ('Ng Hock Cheng').

[25] In *Ng Hock Cheng*'s case, the appellant ('Ng') was a chief storekeeper of the Prisons Department at Kamunting in Taiping. As it transpired, Ng had incurred heavy debts and was therefore liable to disciplinary proceedings under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. After considering Ng's representations, the Public Service Commission dismissed him. Before the High Court, Ng's primary contention was that the punishment meted out by the Public Service Commission was too severe and that he should have been given a punishment lesser than a dismissal. The

question of law raised in the appeal was whether the courts have the power to interfere with the punishment meted out by the Public Service Commission. The Federal Court answered the question in the negative and with the decision took the opportunity in affirming the dissenting judgment of NH Chan in *Tan Tek Seng* in the following words:

> The test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for the court to say. The court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[26] There is no dispute that the above two cases involved public servants and disciplinary procedures relating to them. It can also be no dispute that by operation of arts 132 and 135 of the Federal Constitution, a public servant who wishes to challenge any allegation of misconduct against him, for which punishment has been imposed, can only do so by challenging it in the High Court by way of judicial review. The said public servant cannot challenge the punishment imposed, but only on the allegations preferred against him. The right of public officers to challenge any disciplinary action against them is well explained by Peh Swee Chin FCJ in *Ng Hock Cheng* which are as follows:

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefore, see *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361.

[27] Peh Swee Chin FCJ further explained why the court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned. His Lordship stated that:

> If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

[28] *Tan Tek Seng* and *Ng Hock Cheng* are both cases involving dismissal of a public sector employee. There is a stark contrast between the rights of an

employee in a public sector and an employee under the private sector in Malaysia when dealing with an unlawful dismissal. In the later scenario the employee's rights after the dismissal is governed by s 20 of the IRA. Under the scheme of this provision the Industrial Court is clothed with powers to consider whether the misconduct if proved warrants the punishment of dismissal or otherwise. This powers of the Industrial Court has been clearly elucidated by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 ('Hong Leong Assurance') and *Milan Auto Sdn Bhd v Wong Sek Yen* [1995] 3 MLJ 537 ('Milan Auto').

[29] In *Hong Leong Assurance*, the appellant ('Wong'), an insurance claims manager in the employment of the respondent ('the company'), had been dismissed on the ground that he had misconducted himself by selling motor car wrecks, which was against the rules of the company. Wong's case was referred by the Minister to the Industrial Court for a decision. Without considering whether Wong's misconduct could constitute sufficient cause or excuse for his dismissal, the Industrial Court concluded that Wong's dismissal was wrongful on the procedural ground that he had not been given a right to be heard at any domestic inquiry, contrary to the terms of his employment contract. The Industrial Court awarded Wong compensation in lieu of reinstatement but reduced the quantum because of Wong's misconduct. The company was aggrieved by the whole award, whilst Wong was dissatisfied with the reduced compensation. They applied to the High Court for an order of certiorari to quash the award but both applications were dismissed. They appealed to the Federal Court.

[30] The Federal Court in dismissing Wong's appeal and allowing the company's appeal had clearly indicated that 'in exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man could reasonably come to the conclusion. In this case, it was perfectly justified for the Industrial Court to take into consideration Wong's misconduct as a contributory factor towards the assessment of compensation. It was not only consistent with s 30(5) of the IRA which requires the Industrial Court to act according to equity and good conscience, but it would discourage unfair trade practices by motor insurance executives.

[31] Almost similar facts occurred in the case of *Milan Auto*. There, the respondent ('SY Wong') was a mechanic for the appellant ('the company'). SY Wong was dismissed by the company from work, alleging that he was undisciplined, unproductive and arrogant as he had on several occasions slept during office hours, taken leave without approval, and refused to see the operations manager when requested to do so. Following from a representation

by SY Wong that he had been dismissed without just cause or excuse, the Minister referred the matter to the Industrial Court.

[32] The Industrial Court decided in favour of SY Wong, solely on the ground that the company was in breach of the statutory requirement of 'due inquiry' before dismissal under s 14(1) of the Employment Act 1955 and failure to hold an inquiry before dismissing SY Wong. The Industrial Court was of the view that those factors were sufficient to constitute a dismissal without just cause or excuse, and it was unnecessary to determine whether the alleged misconduct if established, constitute a just cause or excuse for dismissal. The company's application to the High Court to quash the award was dismissed.

[33] Mohamad Azmi FCJ, again speaking for the Federal Court, in allowing the company's appeal repeated what he had said in *Wong Yuen Hock* by stating:

> As pointed out by this court recently in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on reference under s 20 is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitute just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court.

[34] This point has been made earlier but deserves to be reiterated. A public officer who wishes to challenge any allegation of misconduct against him for which punishment has been imposed can only do so by challenging it in the High Court by way of judicial review. It is pertinent to note that the said public officer cannot challenge the punishment imposed, but only the allegations preferred against him. This clearly explains why the court must not substitute its own view as to what is the appropriate penalty for public officer's misconduct, for the view of the particular disciplinary committee as rightly held by the minority view in *Tan Tek Seng* and the Federal Court in *Ng Hock Cheng*.

[35] However, the same cannot be true with regard to the dismissal cases involving private sector employees. Any complaint of unfair dismissal by an employee has to be dealt with under the IRA. The duty of the Industrial Court in dealing with such cases had been laid down in *Hong Leong Assurance* and *Milan Auto*, ie first to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. In deciding whether the proven misconduct would constitute just cause or excuse, the Industrial Court is fully endowed with the power to consider whether the misconduct proved warrants the punishment of dismissal.

[36] Thus, in reference to the questions posed to us, we are of the view that the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s 20(3) of the IRA. We are further of the view that the Industrial Court in exercising the aforesaid functions can rely to its powers under s 30(5) of the IRA based on the principle of equity, good conscience and substantial merit of the case.

[37] Clearly, the reference by the Federal Court in *Milan Auto*'s decision to the 'twofold' test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under s 30(6) in making an award which provides:

> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

[38] Pertinent to note that, under the IRA itself there is an inbuilt mechanism through Item 5 of the Second Schedule to consider the doctrine of proportionality of punishment. Item 5 provides as follows:

> Any relief given shall take into account contributory misconduct of the workman.

[39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[40] As to what is the exact test to be used in deciding whether the proven misconduct constitutes a just cause or excuse for dismissal is a non-issue. Whether it is the reasonable employer's test as adopted by *British Leyland* or the reasonable man test as laid down the Federal Court in *Hong Leong Assurance*, the Industrial Court's decision on that issue is always open to judicial review.

[41] It is trite law that the decision of the Industrial Court is susceptible to

judicial review on the grounds of 'illegality', 'irrationality', 'procedural impropriety' and possibly 'proportionality' under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147). Decided cases after *Rama Chandran* had clearly established that where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, such findings are always amenable to judicial review (see *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79; *Swedish Motors Assemblies Sdn Bhd v Hj Mohd Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288; *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 and *Ranjit Kaur S a/p Gobal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[42] With all the above discussed principles in mind, let us now proceed to examine whether the decision of the Industrial Court in finding the act of the appellant in not declaring in writing that he was serving as a managing director of another company was a minor misconduct which did not warrant a dismissal, is a reasonable decision in the circumstances of the case. We are of the view that the Industrial Court had directed its mind only to factors favouring the appellant, disregarding the very important consideration that the appellant was holding the position as a special assistant to the chairman of the respondent and the appellant's misconduct had destroyed the trust and confidence that the respondent would have placed on him. The fact is that the appellant was dishonest when he declared in writing that he was not serving on the board of directors of any company when he was, in fact, at all material time found to be serving on the board of directors of another company. The appellant had knowingly made a false declaration and with respect, which in our view, in the circumstances and facts of this case is not a minor misconduct, given the fact that the appellant had signed and accepted the Code of Conduct which clearly stipulates that:

> an employee shall not be employed, engaged or be concerned in any kind of trade or business nor shall he/she serve on the Board of Directors of any other company, while in the employment within the PANZANA GROUP OF COMPANIES. Any exception to this ruling shall have the express approval in writing, of the Group Chief Executive Officer. It was also a term in the Code of Conduct that an employee who contravenes the Group's Code of Conduct shall be liable to stern disciplinary action including termination of employment.

[43] In the circumstances, we find that the Industrial Court had failed to direct its mind to all the matters it should have taken into account, and we are convinced that, had the Industrial Court had those factors in mind it would

A have reached another conclusion in that the dismissal of the appellant was reasonable. In short, the dismissal of the appellant by the respondent was fair and not unfair.

B **[44]** For the above reasons, our answers to the questions posed is in the affirmative. However, on the facts and circumstances of this case the appeal is dismissed. As the parties are not asking for costs, we make no order as to costs.

Appeal dismissed.

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Reported by Ashok Kumar

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